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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of MARCY and
STEVEN DIAMOND.

MARCY DIAMOND,

Respondent,

v.

STEVEN DIAMOND,

Appellant.

D057988

(Super. Ct. No. D484733)

APPEAL from an order of the Superior Court of San Diego County, Lisa C.

Schall, Judge. Reversed and remanded with directions.

Steven Diamond appeals a postjudgment order awarding his ex-wife, Marcy Diamond, arrears for Steven's Navy pension in the amount of \$95,186.80. He contends the superior court erred in awarding Marcy Navy pension arrearages for the same period that it awarded spousal support arrearages because the award was contrary to the parties'

earlier stipulated judgment. In addition, he challenges the calculation of the amount of arrears. Marcy did not file a respondent's brief in this matter.

We conclude the court abused its discretion in awarding arrears for both spousal support and Steven's Navy pension over the same period of time. The stipulated judgment explicitly states Marcy would stop receiving the spousal support once she received her share from Steven's Navy pension. Because we reverse the award of arrears for the Navy pension, we do not reach Steven's second contention that the amount of arrears was calculated improperly.

FACTUAL AND PROCEDURAL HISTORY

Steven and Marcy were married on August 28, 1983. On December 7, 2005, the parties entered into a stipulated judgment on the record. Among other things, the stipulated judgment provided Marcy with spousal support of \$885 per month until she received her portion of Steven's Navy pension. Upon receipt of her portion of the pension, Marcy's spousal support "reduce[d] to zero." The parties also stipulated that spousal and child support payments were current as of December 1, 2005.

Based on the stipulated judgment and the testimony of both Steven and Marcy that their marriage was "irretrievably broken," the court granted a judgment of dissolution of the Diamonds' marriage and ordered the marriage dissolved effective December 7, 2005. The court then tasked Steven's attorney with drafting the written judgment.

For reasons not totally clear in the record, Steven's attorney never submitted a written judgment to the court. Instead, more than three years later, Marcy, acting in proper, filed a judgment of dissolution signed by both her and Steven. The form judgment of

dissolution included a written attachment that contained identical language as the December 7, 2005 stipulated judgment. Paragraph 7 of the written attachment states: "[Steven] shall pay to [Marcy] the sum of \$885.00 a month as and for spousal support. Once [Marcy] begins to receive her share of [Steven's] Navy pension directly, spousal support shall be reduced to zero." In addition, the written attachment indicated the community property portion of Steven's Navy pension shall be divided one-half to each party. The record indicates, however, the parties subsequently agreed Marcy's portion of the Navy pension is 46.94 percent. Because the written attachment and the stipulated judgment contain identical terms, we refer to both as the "Stipulation" throughout this opinion.

On July 21, 2009, Marcy filed an application for an order to show cause (OSC), requesting spousal support arrears, Navy pension arrears, sanctions under Family Code section 271, and attorney fees. For purposes of this appeal, we are only concerned with Marcy's request for spousal support arrears and Navy pension arrears. In her application, Marcy argued she was entitled to spousal support arrears in the amount of \$29,899 in principal and \$4,176.08 in interest for a total amount of \$34,075.08 covering December 1, 2005 to September 1, 2009. There is nothing in the record indicating Steven opposed Marcy's request for spousal support arrears.

Marcy also requested Navy pension arrears, but did not request a specific amount. Marcy argued Steven had been retired since June 30, 2002 and began receiving payments from his pension on July 1, 2002. She requested arrears beginning from August 1, 2004.

At the OSC hearing on October 5, 2009, the court awarded Marcy spousal support arrears in the amount of \$34,075. The arrears were calculated as of September 1, 2009. The court further ordered Steven to make monthly payments of \$1,500 to Marcy beginning October 10, 2009. The court did not rule on Marcy's request for Navy pension arrears.

The court held another hearing on the OSC on December 4, 2009. At that time, the parties addressed Marcy's request for Navy pension arrears. Steven argued that the Stipulation decrees Marcy's spousal support would end when she began receiving her portion of the Navy pension. As such, Steven asserted Marcy could not receive arrearages for both spousal support and the Navy pension during the same time period. The court, however, did not rule on this issue.

The court continued the hearing on the OSC to February 4, 2010. At that hearing, Steven again argued that the Stipulation provides Marcy would receive \$885 per month spousal support as a "stop gap" until she began receiving her share of the Navy pension. Steven asserted that upon receiving the pension payment, Marcy's spousal support would be reduced to zero.

In response to Steven's argument, the court reviewed the Stipulation and read paragraph 7 of the Stipulation into the record. It then interpreted paragraph 7 to prohibit Marcy from receiving both spousal support and Navy pension payments at the same time: "Now, how I read that is the following: she doesn't get to have both. So if I've already made an award for spousal support arrears -- and that's why I asked you what the dates constituted -- starting in '05 through September 1st of '09, then I need for you to address

why I would be back here looking at military arrears for the period of the years you've cited in this matter '04, '05, '06 and '07?" The court further expressed its concern about an award of Navy pension arrears: "So what kind of adjustment you're asking me to make, I can't and won't be comfortable with just presuming that I am going to create some kind of a double-dip." Thus, the court appeared to conclude Marcy was not entitled to both the spousal support and the Navy pension during the same period of time: "I don't think [Marcy's] entitled to both, okay? 'Both' being both the spousal support that was ordered and the military retirement."

Despite expressing concern about awarding arrears for both spousal support and the Navy pension for the same time period, the court did want to compare what Marcy would have been paid under the Navy pension during the same period of time that she had already been awarded spousal support arrears (Dec. 2005 through Sept. 2009). If Marcy would have been paid more from the Navy pension than the \$885 in monthly spousal support, the court seemed willing to increase the arrears already awarded.

In response to the court's apparent unwillingness to award arrears for both spousal support and the Navy pension during the same period of time, Marcy argued that the spousal support and Navy pension were different. She classified the Navy pension as a community asset as opposed to an award of spousal support in a marriage dissolution action. The court disagreed with Marcy's contention, noting that there was no indication in the record that the previous judge made any finding of fact to support the calculation of spousal support of \$885 per month. Instead, after reviewing "everything in context," the

court was convinced the parties intended the spousal support to serve as a reasonable place holder for what Marcy would initially receive for her portion of the Navy pension.

Ultimately, the court did not award any arrears for the Navy pension at the February 4 hearing, but instead, ordered Steven to produce "all documentation necessary to establish what his [Navy pension] payments were that he received for the years 2004 through 2007." The court reserved final ruling on the issue of Navy pension arrears for a future hearing.

The parties again addressed Marcy's request for the Navy pension arrears at a hearing on March 24, 2010. Marcy noted that she had not received any of the Navy pension documentation the court ordered Steven to produce. After observing that Steven had not produced the ordered documents or cooperated in resolving the remaining issues, the court granted all the requested relief in Marcy's OSC application.

Steven, who was represented by new counsel, then asked the court if it was awarding two sets of arrears: one for spousal support and the other for the Navy pension. Marcy argued the Navy pension arrearages were an asset and the spousal support was not; thus, the court could award arrears for both during the same period of time. The court appeared to agree: "This is the [Navy pension] arrearages, so they are separate arrearage orders."

Steven argued the Stipulation prohibited Marcy from receiving both spousal support and her share of the Navy pension for the same time period. In response, Marcy represented this issue had already been argued. The court then addressed Steven's argument: "You're not before me on that issue. You want to represent him on that, then

ask the court to reconsider its ruling on that. Come back and let me know. But I've already made a ruling on this, okay? That's it. Thank you."

On April 5, 2010, Steven filed a motion for reconsideration and to quash wage assignment. On June 14, 2010, the court took the motion off calendar, finding it untimely and in violation of the local rules. The court had yet to enter an order, and Steven did not apply ex parte for the court's permission to file a motion for reconsideration.

Later that day, the court entered an order awarding Marcy Navy pension arrears in the amount of \$95,186.80 for the period of December 2005 through June 2010. Steven timely appealed.

DISCUSSION

Steven argues the court abused its discretion in awarding Marcy Navy pension arrears for the same period in which she already had been awarded spousal support arrears because the Stipulation prohibited such an award. Before we review the court's exercise of discretion, however, we must interpret the Stipulation.

The interpretation of a stipulation incorporated into a judgment of dissolution is a question of law we review de novo. (See *In re Marriage of Davis* (2004) 120 Cal.App.4th 1007, 1017-1018; see also *In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439.) Nevertheless, "[c]ourts interpreting provisions of marital settlement agreements may be subject not only to general contract interpretation rules but also to family law public policy considerations." (1 Cal. Marital Settlement and Other Family Law Agreements (Cont.Ed.Bar 3d ed. 2011) § 3.9, pp. 82–83, citing *In re Marriage of Vomacka* (1984) 36 Cal.3d 459, 469.)

"The interpretation of a written instrument is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citation.] Unless interpretation turns upon the credibility of extrinsic evidence, an appellate court is not bound by the trial court's construction but makes an independent determination of the meaning of the writing." (*In re Marriage of Smith* (2007) 148 Cal.App.4th 1115, 1120.) In interpreting a written agreement, we "look first to the language of the contract . . . to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) The intent is to be inferred, if possible, solely from the written provisions of the contract. (Civ. Code, § 1639.) Language in a contract must be interpreted as a whole and in the circumstances of the case, and cannot be found ambiguous in the abstract. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265; Civ. Code, §§ 1641, 1647.)

Paragraph 7 of the Stipulation clearly states that Marcy is not to receive spousal support and her share of the Navy pension at the same time: "[Steven] shall pay to [Marcy] the sum of \$885.00 a month as and for spousal support. Once [Marcy] begins to receive her share of [Steven's] Navy pension directly, spousal support shall be reduced to zero." Thus, the Stipulation unmistakably provides that Marcy's spousal support ends when she receives her share of the Navy pension.

There is no indication in the record that Marcy ever advocated a different interpretation of the Stipulation. At best, she implied that the court should ignore the Stipulation because the Navy pension is an asset, and spousal support is not.

In general, Marcy is correct in her categorization. Under the Uniformed Services Former Spouses' Protection Act, a state court may treat "disposable retired pay" of a member of the military as community property and determine its disposal in accordance with state law. (10 U.S.C. § 1408(c)(1); *In re Marriage of Krempin* (1999) 70 Cal.App.4th 1008, 1012.) Spousal support, on the other hand, is not a community asset, but consists of money paid from one party to support the other. Family Code "[s]ection 4330 authorizes the trial court to order a party to pay spousal support in an amount, and for a period of time, that the court determines is just and reasonable, based on the standard of living established during the marriage, taking into consideration the circumstances set forth in [Family Code] section 4320." (*In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1559.) Family Code section 4320 requires the trial court to consider the parties' earning capacity, their ability to pay, taking into account income, assets and standard of living; duration of the marriage; the needs and marketable skills of the supported party; and the goal that the supported party become self-supporting. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 304.) The court must consider each of the relevant circumstances, but has discretion to determine the appropriate weight to accord to each. (*Ibid.*)

Although Marcy correctly notes the difference between spousal support and a pension, her argument is nonetheless flawed. There is no indication here that any court

ever considered the factors in Family Code section 4320 to award Marcy spousal support in the amount of \$885 per month. Instead, Marcy and Steve agreed, as part of the Stipulation, to calculate spousal support at \$885 per month until Marcy began receiving her portion of the Navy pension. The parties therefore did not intend the spousal support to be an additional payment beyond what Marcy would receive under the Navy pension. Put another way, the spousal support was merely a temporary payment to be replaced by payments under the Navy pension.

Simply put, the Stipulation prohibits Marcy from receiving spousal support and Navy pension payments at the same time.

Against this interpretation, we review the court's award of \$95,186.80 in Navy pension arrears for the period of December 2005 through June 2010. As a threshold matter, it is unclear if the court ever specifically ruled on the propriety of Navy pension arrears in general. At the February 4, 2010 hearing, the court expressed skepticism about awarding arrears for both spousal support and the Navy pension for the same time period. However, the court did not make any ruling, but reserved its ruling for a later date.

At the March 24, 2010 hearing, after conveying its displeasure with Steven's failure to cooperate, the court granted all of Marcy's requested relief in her OSC application, which included Marcy's request for Navy pension arrears. When Steven attempted to question the award of Navy pension arrears for the same period as the spousal support arrears, the court stated that it had already ruled on this issue and Steven could not address it again at the March 24 hearing. Notwithstanding, we find nothing in the record indicating the court had ruled, prior to the March 24 hearing, that arrears could

be awarded for both spousal support and the Navy pension for the same period of time. As such, it appears the court was mistaken in telling Steven it had already ruled on that issue. The court thus failed to exercise its discretion, which we determine was an abuse of discretion. (See *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 523.)

In addition, even if we assume the court did determine that arrears could be awarded for both spousal support and the Navy pension over the same period of time, we conclude such a determination would be contrary to the Stipulation and also an abuse of discretion.

DISPOSITION

The order is reversed. We remand this matter back to the superior court: (1) to determine if Marcy is entitled to Navy pension arrears; and (2) if so, to recalculate the Navy pension arrears in light of its previous order of spousal support arrears in the amount of \$34,075 covering December 1, 2005 to September 1, 2009 and our interpretation of the Stipulation.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.